

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

_____)	Case Nos. 07-CA-201332
HURON VALLEY-SINAI HOSPITAL)	07-CA-205971
)	07-CA-213556
Respondent,)	07-CA-217647
)	
and)	
)	
MICHIGAN NURSES ASSOCIATION)	
)	
Charging Party.)	
_____)	

**RESPONDENT HURON VALLEY-SINAI HOSPITAL’S REPLY TO COUNSEL FOR
THE GENERAL COUNSEL’S ANSWERING BRIEF TO RESPONDENT’S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Dated: July 12, 2019

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INTRODUCTION

The ALJ's conclusions are erroneous because they are based on mischaracterizations of the trial record and misapplication of binding precedent. The General Counsel's Answering Brief, which largely mirrors the Decision, fails to demonstrate otherwise. Indeed, the Answering Brief fails to meaningfully respond to the Hospital's arguments and cited authorities.

In addition to its errors, the ALJ's Decision, if adopted, will inevitably discourage good faith actions by employers, like the Hospital, to proactively take steps to learn of suspected legal, policy or ethical violations from exiting employees so that they can take self-corrective actions. These actions will be discouraged because employers, like the Hospital, will cease the practice altogether to avoid liability or employees will choose to be less candid with empty promises of confidentiality. Therefore, the Board should reverse the ALJ's Decision.

ARGUMENT

I. The General Counsel's Answering Brief Confirms that The ALJ Erred by Concluding that the Hospital Violated the Act with its Meal and Rest Break Policy

A. The Hospital did not Unilaterally Change its Practice Regarding the Combination of Breaks

First, the trial record reflects continuity in the Hospital's application of its long-standing policy regarding the combination of breaks by nurses.¹ As a threshold matter, both the Status Quo *and* Revised Policies contain the same discretionary language: "Combining of meal periods and rest breaks will be permitted only with the approval of the Department Manager or designee." This is natural given the unpredictable nature of the emergency room and the need for scheduling to account for acuity, census, and the current emergency room activity.

¹ Policy 1 HR 313. *See* General Counsel Exhibit 8, 2014 Status Quo Meal and Break Policy; General Counsel Exhibit 11, 2018 Revised Meal and Break Policy.

Second, the trial record reflects that the Hospital's clinical coordinators have always in practice, consistent with the Meal and Break Policy, used their discretion to grant or deny the combination of breaks. Allison DeMarais testified that clinical coordinators are always authorized to permit combined meal and rest breaks as circumstances permit.² This testimony was corroborated by the testimony of Tina Grossman. Ms. Grossman admitted that the Hospital continues to allow nurses to combine meal and rest breaks, and that coordinators have the authority to "either give you a 30-minute break or an hour break."³ Specifically, Ms. Grossman testified as follows:⁴

Q. Okay. After April 9th, were you allowed to take hour breaks after that point?

A. Yes.

Accordingly, the ALJ erred in concluding that the Hospital violated the Act by "strictly enforcing" its "prohibition against combining breaks" because this conclusion is entirely unsupported by the trial record.

B. The Hospital did not take "Discriminatory Action" against Tina Grossman

The Answering Brief, like the Decision, presents a false factual narrative regarding Steve Smades' actions. There is no dispute that the incident arose the weekend of April 14, 2018—the first weekend after clinical coordinators were requested to assign thirty-minute meal periods to nurses due to *current* staffing and patient needs. Ms. Grossman claims that Mr. Smades—the weekend clinical coordinator—retaliated against her by assigning her a thirty-minute meal period.

² Tr. at pp. 92, 94 (DeMarais).

³ Tr. at pp. 74, 76 (Grossman).

⁴ *Id.* at p. 74.

Specifically, Ms. Grossman testified as follows:

A. It was either Sunday or Monday, so the 15th or 16th. He apologized for retaliating to her being in the break room by giving me a 30-minute break.

Q. What exactly did he say if you can recall?

A. He apologized. I don't know his exact words, but he just didn't like the fact that [Union Rep Liz Riley] was in the break room.

Q. Okay. With respect to your conversation with Mr. Smades, do you recall him saying anything about an interaction with Ms. Riley or accusing her of anything?

A. He accused her of calling him an asshole.

Therefore, the trial record reflects that, at best, Mr. Smades retaliated—or rather used his discretion adversely—because he was angry that Liz Riley allegedly called him an “asshole.”⁵ The General Counsel cites no evidence that the alleged “asshole” remark occurred in the context of protected activity, e.g., a bargaining session. Nor did the General Counsel cite evidence that Mr. Smades was provoked by any impermissible factors—e.g., involvement in union activity—aside from his personal offense at being referred to in a derogatory fashion. Because Ms. Grossman's inadmissible hearsay testimony establishes neither protected activity nor anti-union animus, the Hospital did not violate Sections 8(a)(1) and (3) of the Act.

Accordingly, the ALJ erred in concluding that the Hospital violated the Act by denying MNA members breaks in retaliation for the conduct of a union representative because the conclusion is entirely unsupported by the trial record.

⁵ *Id.*

C. The Hospital did not Unilaterally Change its Meal and Break Policy Regarding Relief of Bargaining Unit Members

First, as background, the Hospital has frequently communicated to its employees and the MNA its need to balance staffing and patient care. The record reflects that on March 13, 2018, the Hospital held a staff meeting and informed nurses that there would be an adjustment in meal and rest breaks to account for the absence of a float nurse.⁶ The Hospital also *reiterated* its expectations that clinical coordinators should, *as necessary*, cover breaks and meal periods.⁷

This evidence is corroborated by the testimony of Ms. Grossman, who admitted that her clinical coordinator covered her breaks in the past and continues to do so. Specifically, Ms. Grossman testified as follows.

Q. And have there been times that [clinical coordinator Smades] has covered your lunches and breaks...?

A. Yes, occasionally.

Q. Was that true prior to April of 2018?

A. Yes.

Q. And it's been true since 2018, April of 2018?

A. Yes.

Accordingly, the ALJ erred in concluding that the Hospital violated the Act by “strictly enforcing” its “prohibition against combining breaks” and its coverage of meal breaks by clinical coordinators because these conclusions are entirely unsupported by the trial record.

⁶ General Counsel Exhibit 16, ED Break Statement E-mail.

⁷ General Counsel Exhibits 13 and 14, E-mail Exchange.

D. The Hospital did not Promulgate a “New Policy” Threatening Unit Employees with Disciplinary Action if They Missed Paid Breaks

There is simply no evidence in the trial record to support the ALJ’s conclusion that the Hospital applied the Revised Policy to MNA members—with its language authorizing disciplinary action against nurses who consistently miss meals without approval⁸—rather than the Status Quo Policy. Instead, the trial record reflects that the Hospital unequivocally notified the MNA that the Status Quo Policy applies to its members.⁹ Indeed, Mr. Schraub acknowledged his understanding of this fact.¹⁰

Accordingly, the ALJ erred in concluding that the Hospital violated the Act by applying the Revised Policy rather than the Status Quo Policy to MNA members because the conclusion is entirely unsupported by the trial record.

II. The General Counsel’s Answering Brief Confirms that the ALJ Erred by Concluding that the Hospital Violated the Act by Failing to Offer the MNA a Reasonable Accommodation to Address its Confidentiality Concerns with MNA’s Information Request

First, as a threshold matter, there is no dispute that the MNA requested the Hospital’s unredacted exit interview forms to ascertain whether allegedly *low nurse staffing* was a cause of turnover.¹¹ Only the forms’ fifth question has bearing on this issue, as it asks exiting employees: “What prompted you to seek alternative employment?”¹²

⁸ General Counsel Exhibit 11, p. 1.

⁹ General Counsel Exhibit 14 (E-mails from Ms. DeMarais and Richard Martwick stating that the “Status Quo” Meal and Break Policy was being applied to unit members); and Tr. at p. 39 (Schraub).

¹⁰ General Counsel Exhibit 14, pp. 3-4.

¹¹ Tr. at pp. 12-13 (Schraub).

¹² Respondent Exhibit 2 at pp. 2, 6-8.

In addition, the record reflects that answers to certain interview questions that have no bearing at all on the role of staffing in turnover, and therefore are irrelevant, were deemed confidential to the Hospital. These questions are as follows:¹³

No. 15: "Are you aware of any unlawful or fraudulent behavior at DMC or Tenet?"

No. 16: "Are you aware of any behavior that violates the Tenant Standards of Conduct?"

No. 17: "Have you been instructed to do something that you felt was unlawful or fraudulent?"

No. 18: "Have you been instructed to do something that you felt was a violation of the Tenet Standard of Conduct?"

No. 19: Are you leaving Tenet because of any of these concerns?

In good faith, the Hospital attempted to provide the MNA with answers to the fifth question while preserving its confidentiality interests in answers to the irrelevant questions. Shaun Ayer testified at length about how the Hospital "proposed accommodations for the Union[] so they would have access for the information that would be relevant for their needs while the Employer would be able to protect their confidentiality concerns."¹⁴ These facts are undisputed.

Second, the General Counsel argues that the answers to *all* questions in the exit interviews are presumptively relevant because the information "about staffing, fraud, discrimination, harassment, or other issues...would be vitally important" to the MNA.¹⁵ However, the MNA's information request had nothing to do with "fraud, discrimination, harassment, or other issues." Instead, according to Mr. Schraub, the MNA requested the exit interviews to learn whether

¹³ Respondent Exhibit 2 at pp. 2, 6-8.

¹⁴ Tr. at p. 98.

¹⁵ Answering Brief, p. 22.

allegedly *low staffing* was a cause of nurse turnover.¹⁶ Therefore, the General Counsel's after-the-fact justification for the MNA's overly broad request is unsupported by the record.

Third, and with no discussion of the actual record, the General Counsel vaguely concludes that the Hospital failed to assert legitimate confidentiality interests in the answers to questions fifteen through nineteen.¹⁷ But the trial record reflects the opposite. The exit interview forms clearly promise confidentiality to exiting nurses.¹⁸ And binding precedent acknowledges an employer's inherent interest in facilitating candid reporting to enable proper investigations and corrective actions. *ASARCO, Inc. v. NLRB*, 805 F.2d 194, 199 (6th Cir. 1986) (citations omitted) (emphasis added); *see also Anheuser-Busch, Inc.*, 237 NLRB 982, 984 (1978) ("Witnesses may be reluctant to give statements absent assurances that their statements will not be disclosed...Requiring either party to a collective bargaining relationship to furnish witness statements to the other party would diminish rather than foster the integrity of the . . . process.") (Emphasis added). The General Counsel entirely ignores this testimony and the Hospital's cited authorities.

Fourth, the General Counsel argues that even if the unredacted exit interviews are confidential, the Hospital failed to bargain over a reasonable accommodation. It relies entirely on Mr. Schraub's uncorroborated testimony that the Hospital failed to offer the MNA an accommodation. However, Mr. Ayer testified in great detail about the accommodations offered by the Hospital. And Mr. Ayer's testimony is corroborated by the Hospital's bargaining notes.¹⁹ The ALJ observed the witness testimony, weighed the evidence, and credited Mr. Ayer's testimony

¹⁶ Tr. at pp. 12-13.

¹⁷ General Counsel Answering Brief, p. 23.

¹⁸ Tr. at p. 99.

¹⁹ Respondent Exhibit 3.

instead of Mr. Schraub.²⁰ As such, the Board should give appropriate deference to the ALJ's credibility determinations. *See Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 N.L.R.B. 586, 589 (1996) ("Weight is given to the administrative law judge's credibility determinations because she 'sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records.'") (quoting from *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)).

In addition, the General Counsel mischaracterizes the trial record regarding the Hospital's proposed accommodations. The record reflects that, after first offering a chart summarizing requested information, the Hospital offered the MNA all unredacted exit interview records, subject to a confidentiality agreement, with the confidential information redacted.²¹ ***In addition to this information***, the Hospital offered the MNA the contact information for former nurses so it could contact them and perhaps obtain more elaborate explanations. Therefore, contrary to the General Counsel's bare assertions, the Hospital did not offer to provide contact information ***alone*** as an accommodation to the MNA.

Finally, the General Counsel mischaracterizes *Borgess Med. Ctr. & Michigan Nurses Ass'n*, 342 NLRB No. 109, 1106 (2004). According to the General Counsel, *Borgess* recognizes a legitimate confidentiality interest in hospital incident reports only if their purpose is to reduce the likelihood of death or serious injury in patient care. However, the holding of *Borgess Med. Ctr.* broadly applies to patient care. Specifically, the Board held that:

Here, the record shows that Michigan state law protects from disclosure health care facilities' self-review documentation. The judge found that the ***public policy behind the statute was to insure that these facilities provide the best and most competent healthcare possible***. No party disputes that finding, and it is undisputed that the Respondent uses its incident reports to identify trends and improve its processes so as to reduce the likelihood that a patient will suffer serious injury or death as a result

²⁰ Decision, p. 8.

²¹ Tr. at pp. 98 (Ayer), 99 (Ayer), 105 (Ayer); Resp. Exhibit 3 (stating "HVSH proposing confidentiality of exit w/redacted info[.]").

of a treatment error. We acknowledge the State of Michigan's public policy interest in such self-critical documentation in the health care context. *Furthermore, the Michigan Supreme Court has recognized the importance of the 'assurance of confidentiality' provided by state law in fostering candid self-assessment by health care facilities to improve patient care.* We therefore find that the Respondent has established a legitimate confidentiality interest in the incident reports.

Borgess Med. Ctr., 342 NLRB at 1105-1106. (Citations omitted) (emphasis added). Plainly, the Board's recognition of a legitimate confidentiality interest in hospitals' self-review records is to improve health care generally, not simply to avoid deaths and "serious" injuries.

Accordingly, the Hospital has a legitimate and substantial confidentiality interest in the exit interview responses at issue and offered the MNA reasonable accommodations. The ALJ erred in concluding otherwise.

CONCLUSION

For the foregoing reasons, Respondent Huron Valley-Sinai Hospital respectfully requests that the National Labor Relations Board reverse the Administrative Law Judge's Decision in its entirety and dismiss the Complaint in this matter.

Respectfully Submitted,

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Dated: July 12, 2019

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing document via the Board's electronic filing system, and served copies on the Reginal Director, Counsel for the General Counsel, and the Charging Party's Counsel on July 12, 2019 as follows:

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